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THE CONSTITUTION AS SUICIDE PACT

Saikrishna Prakash*

INTRODUCTION

Michael Paulsen has written a wonderful, creative article.¹ In his characteristically engaging manner, he argues that we ought to employ a “meta-rule of construction” and consistently construe the Constitution to avoid “constitutional implosion.”² Where such “saving” constructions are impossible, however, the law of self-preservation must take precedence.³ Priority must “be given to the preservation of the nation whose Constitution it is, for the sake of preserving constitutional government over the long haul, even at the expense of specific constitutional provisions.”⁴ Professor Paulsen does not thereby countenance constitutional “violations,” at least in his own mind. To engage in regime and constitutional preservation, even at the expense of particular constitutional provisions, is to act *consistent* with the Constitution rather than contrary to it. According to Professor Paulsen, the Constitution contains a general self-preservation exemption (the rule of necessity) to its seemingly iron-clad prohibitions and rights.⁵

Who favors constitutional suicide? More accurately, who favors a constitution that lacks an emergency provision authorizing the President to suspend some or all of its parts? Let me be the first to fall on my sword. Though I count myself as one of the many admirers of Professor Paulsen’s work, I do not believe that he has made his case, at least not yet. I question whether the Constitution contains a “meta-rule of construction” which requires that the “Constitution should be construed, where possible, to avoid constitutionally self-destructive re-

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1 See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004).

2 *Id.* at 1257.

3 *Id.*

4 *Id.* at 1258.

5 *Id.* at 1280–81.

sults.”⁶ Moreover, I doubt that the Constitution grants the President a latent and more powerful authority to sacrifice constitutional provisions in order to preserve and defend the Constitution and nation as a whole. In my view, though the Constitution creates a powerful chief executive, it does not empower the President to suspend the Constitution in order to save it.

My disagreements are on four levels. Professor Paulsen regards it as obvious that any constitution without a rule of necessity is deeply flawed.⁷ Given the crises that were sure to buffet a young and weak nation (which is precisely what America was in 1789), it would have been foolish and inconceivable to omit a rule of necessity by which the Constitution’s many constraints could be relaxed or eliminated in times of dire need. Surely the Constitution’s makers would not have bequeathed us a patently faulty patrimony, or so his argument goes.

As strange as this may sound to Professor Paulsen, I do not regard it at all obvious that people framing a constitution would include an “anti-suicide” provision. In fact, there are many sound reasons why reasonable people might omit a rule of necessity. To begin with, constitutional framers might value other things, like religious freedom or a slavery prohibition, more than the durability of the constitution and the nation. In particular, constitutional framers might not wish to frame a constitution that permits the expedient sacrifice of such principles, even temporarily. Moreover, constitution-makers might believe that officials will violate the constitution on grounds of necessity anyway, and that we ought not to multiply those violations by explicitly sanctioning what otherwise might occur once in a blue moon.

Second, Professor Paulsen’s meta-rule of construction has several disquieting features. Conventional rules of construction generate a single meaning, yet Professor Paulsen’s meta-rule contemplates that a single provision might mean many different things. Indeed, the meta-rule of construction makes it possible for an ambiguous constitutional provision to mean two opposite things depending upon the emergency context. Moreover, the meta-rule apparently lacks any basis in the Constitution itself, thus suggesting that it is an extraneous device deployed in order to achieve some desirable set of outcomes. But there are many rules of construction that one might wish to apply to the Constitution in order to achieve some desirable outcome, and it is not obvious why we should engraft this extra-constitutional rule of construction and not others.

6 *Id.* at 1267.

7 *Id.* at 1258.

Although I think Professor Paulsen's claim ultimately rests on the historical understanding of executive power, there are several textual and structural reasons to suppose that the Constitution lacks the rule of necessity. As a textual matter, neither the executive power⁸ nor the Oath Clause⁹ appears to encompass the power to "suspend" constitutional constraints on the federal government. As Professor Paulsen admits, the latter clause does not grant power.¹⁰ Instead, it creates a duty. The former clause grants powers—but among the powers which we know it grants are the power to execute statutes,¹¹ a power in severe tension with a supposed power to *suspend* higher law provisions found in the Constitution. Structurally, there are clauses which contain "emergency" exemptions of various sorts, such as the Third Amendment.¹² There are other clauses that conspicuously lack this flexibility, seemingly creating absolute commands or prohibitions.¹³ The existence of clause-specific, mini rules of necessity suggests that the Constitution probably lacks a constitution-wide rule of necessity. Moreover, if we read the entire Constitution as subject to balancing during emergencies and the like, we transform all the seemingly absolute constraints into mushy, conditional fetters, and also render superfluous the explicit flexibility that the Constitution actually cedes to the federal government.

Finally, I know of no history suggesting that the executive branch or governments generally were given the constitutional power to suspend their constitutions in times of crisis. English history, at least,

8 "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1.

9 "Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'" *Id.* art. II, § 1, cl. 8.

10 Paulsen, *supra* note 1, at 1263 n.14.

11 See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 713–42 (arguing that Executive Power Clause provides a textual basis for the presidential power to execute statutes).

12 "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, *nor in time of war, but in a manner to be prescribed by law.*" U.S. CONST. amend. III (emphasis added).

13 To take just one of many examples, the Sixth Amendment contains several categorical guarantees:

In *all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI (emphasis added).

suggests that chief executives enjoyed no such power. The English Crown was specifically prohibited from suspending and dispensing the law.¹⁴ Yet Professor Paulsen argues that the American chief executive could (must?) suspend the entire Constitution in order to preserve it and the nation it creates.¹⁵

Nothing said here comes close to proving Professor Paulsen wrong. The Constitution may have ceded such a power, and (more likely) there may have been Presidents (prior to Lincoln) who ignored constitutional constraints in emergencies, whether or not the Constitution authorized such suspensions. Yet if the foundations of the rule of necessity primarily rest on the alleged implausibility of its omission, I think there are sensible reasons to think the unthinkable. Perhaps the Constitution was not meant to endure for the ages where its "survival" requires the suspension of the Constitution itself.

I. THE PLAUSIBILITY OF SUICIDE

Would it be odd, even daft, to craft a constitution that lacked a failsafe that enabled someone to suspend some or all of the constitution's provisions in order to preserve the entire constitutional system and the nation? Professor Paulsen thinks the answer is obvious—a constitution simply must have a rule of necessity or it is deeply troubled and flawed.¹⁶ I readily acknowledge the potential utility of Professor Paulsen's rule of necessity. From one perspective, constitutions as a whole (and not just particular provisions) must be able to bend in emergencies, not break. If a constitution lacks a generic failsafe, this increases the likelihood that such a constitution will be abandoned when some unforeseen crisis strikes the nation. If a constitution does not have the ability to endure for the ages, many would count its potential transience as a weakness.

Nonetheless, I do not regard Paulsen's first-order, overriding preference for a permanent constitution as self-evident. The question

14 See ENGLISH BILL OF RIGHTS (U.K. 1689), available at <http://www.yale.edu/law/web/avalon/england.htm>.

15 Professor Paulsen attempts to draw support for his rule of necessity from the actions of President Abraham Lincoln. Yet the Constitution's original meaning should not be discerned in the context of the Civil War, when there were many more relevant periods in closer proximity to the Founding. For instance, a fruitful area of further inquiry would be the experiences of the state and national governments during the Revolutionary War, the Critical Period, and the Quasi-War with France. For instance, to what extent were state constitutions, pre-1787, read as containing a rule of necessity? If the Constitution contains a rule of necessity, the proof will be found in the experiences of these earlier periods.

16 Paulsen, *supra* note 1, at 1258.

must be whether reasonable constitution-makers could reasonably omit a rule of necessity from their preferred constitution. My goal is to introduce some reasonable doubt about Professor Paulsen's claim that omission of such a rule would, in his words, be "implausible."

As noted earlier, durability certainly matters. But in many cases the Constitution's actual provisions matter far more. If, post-Reconstruction, a resurgent and militarily superior South had demanded that the Thirteenth Amendment be read as not applying to the South, could a President have sacrificed the amendment on grounds of necessity?¹⁷ Assume that failure to comply with the demand would be met with a successful secession—the end of the nation. If Professor Paulsen is right, the Thirteenth Amendment not only may be discarded, it absolutely must be discarded. A President Paulsen could not act otherwise, given his oath to preserve, protect, and defend the Constitution and the nation. Needless to say, many of us might be willing to see the South go its separate way in these circumstances, and hence may not see the wisdom of a rule of necessity requiring the President to sacrifice treasured constitutional provisions.

Or suppose the Constitution clearly declared that life began at conception and that abortions were illegal. Must we read such a provision out of the Constitution if doing so will ensure the continued existence of the nation and the rest of the Constitution? Even if this amendment somehow received the supermajority necessary for ratification, I can imagine many powerful states on the losing side (California, New York) that might prefer to leave the Union rather than live under such a provision. If the rule of necessity were extant, however, a President Paulsen must swallow hard and abandon this rather clear amendment. Under the Paulsenian constitution, it does not matter how absolute some provision is because *every* liberty, right, or restriction can be trumped by the logic of self-preservation. Apparently nothing need remain inviolate, save for the twin principles of constitutional and national preservation.

My point is not that the rule of necessity is somehow revolting. Instead my point is that while the rule of necessity undoubtedly will seem attractive to some, it also seems equally clear that there will be others who value the sanctity of the Constitution's substantive provi-

17 Throughout this Part, I have tried to select hypotheticals designed to target Professor Paulsen's substantive sympathies and preferences. I want to see how many "limbs" he is truly willing to sacrifice to "save" the patient. Others will have their own favored provisions (such as the Equal Protection Clause, the Due Process Clauses, or the Takings Clause) and in thinking about the rule of necessity's plausibility, they ought to weigh the temporary or permanent sacrifice of such provisions in the name of national and constitutional preservation.

sions above all else. Like the ancient Romans who declared that justice must be done though the heavens should fall (*fiat justitia, ruat coelum*), there will be those who proclaim that the Constitution should remain inviolate though the government may fall.

Perhaps Professor Paulsen imagines that the Constitution of Necessity only authorizes temporary suspensions and not permanent rule-of-necessity-based amendments. After all, Lincoln did not amend the Constitution—he never permanently sacrificed any constitutional provisions. Instead, he made a pragmatic judgment that the temporary suspension of a few provisions might ensure the Union's survival. But limiting the rule to temporary suspensions still seems rather troubling. Once again, does the Constitution permit (or even require) slavery for a decade in order to save the nation, notwithstanding the Thirteenth Amendment? The rule of necessity answer is an emphatic "yes." And the answer is yes even though there is no guarantee that any crisis will be short-lived. If longer times are necessary to save the Republic, what stands in the way of suspensions that last "temporarily" for decades? Had the Civil War dragged on for a half-century, I suppose Lincoln's temporary constitutional suspensions would have become semi-permanent and properly so. This is hardly an academic point. The Cold War lasted almost five decades and the war on terror will likely last much longer.

More fundamentally, any attempts to cabin the rule of necessity, to limit it to temporary suspensions, seem "implausible," at least if one subscribes to its underlying logic. If the rule of necessity only permits temporary suspensions, it is not really a rule of *necessity*. There may well be cases where permanent rule-of-necessity amendments might avoid constitutional and national collapse, and to the extent that the Constitution does not permit such amendments the Constitution is a suicide pact (at least as Professor Paulsen uses the term). Thus I do not see how one can successfully limit the rule of necessity to temporary suspensions of constitutional provisions. Either you believe in a real rule of necessity (including the possibility of permanent rule-of-necessity amendments) or you are in favor of a suicidal constitution.

The Lincolnesque response to arguments against a rule of necessity is to assert that we all have an incredibly easy choice, a constitutional no-brainer in fact. We must sacrifice the limb to save the life rather than sacrifice the life to save the limb. At one level, these arguments resonate. Keep your eyes on the prize and don't sweat the details. But these maxims are question begging in the context of our

Constitution. Is the Thirteenth Amendment¹⁸ the limb or the life? And if the Thirteenth Amendment is but a limb, what about a combination of the Thirteenth Amendment plus the Bill of Rights? Are all these amendments, taken together, but expendable limbs to be sacrificed for some higher good of national unity? Is religious freedom a means to constitutional or national perpetuity or an end in and of itself? I think the answer implicit in the rule of necessity is implausible. Surely self-preservation of the nation at all costs is not the Constitution's end. Nor is Lincolnesque preservation of the Constitution at all costs a worthy end, for that would suggest that we may suspend or discard *every* constitutional provision to "save" the Constitution. This is reminiscent of the Vietnam era claim that to save a village, we must destroy it. Here, if we serially sever limbs on the grounds that the patient's life is at stake, we run the risk that we will be left with a lifeless stump. In some situations, at least, it ought to be clear that the rule of necessity's medicine will be much worse than the disease. Dr. Lincoln's choice will not always be a no-brainer.

Even if one accepted Professor Paulsen's view that constitutional and national preservation were the Constitution's alpha and omega, the rule of necessity would still require difficult tradeoffs. Professor Paulsen assumes that national and constitutional preservation are inseparable goals. If you protect one, you necessarily protect the other. But these goals are not Siamese twins. In many instances, pursuing one goal will involve the sacrifice of the other. Take the Civil War. Lincoln's response to secession was to temporarily sacrifice constitutional provisions in order save the Union. But an alternative response would have been to sacrifice the Union to keep the Constitution inviolate. Lincoln could have allowed the South to secede and preserved the Constitution. Once again, which was the life and which was the limb? One might argue that when faced with the choice between the Union and the Constitution, Lincoln had a constitutional duty to choose the latter. He took that all-important oath to safeguard the Constitution and the Constitution, on its face, neither requires a perpetual Union nor prohibits secession.¹⁹

18 "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

19 I would argue that Lincoln regarded the Union as paramount over the Constitution. Only this explains his willingness to sacrifice the former for the latter, rather than the other way around. I am sure that Lincoln and Professor Paulsen believe that the Constitution created an indestructible union. But here we have explicit provisions (like the First Amendment) colliding with a supposed, implicit constitutional principle. One common intuition suggests that the specific constitutional provisions

Those who agree with Lincoln's choice to prefer the Union over the Constitution might nonetheless fault the rule of necessity trade-offs he made. Rather than fighting an uncertain war, Lincoln arguably ought to have sought the South's terms for remaining in the Union. After all, the outcome of a war would be uncertain—thousands may die, many more thousands would mourn the loss of their loved ones, and Lincoln may sacrifice various constitutional limbs during the course of the war and still lose the patient. So why not take the prudent, risk-averse course, yield to the South and avert a civil war? Lincoln temporarily sacrificed many constitutional limbs without any guarantee that his surgery would save the Union. If he was willing to sacrifice some limbs up front (say by agreeing to some constitutional amendments), he might have guaranteed success. What surgeon operating against the backdrop of the rule of necessity (preserve the nation at all costs) wouldn't take the guarantee when both paths likely involve the sacrifice of some limbs? In return for a provision protecting slavery and the sacrifice of a few constitutional provisions, Lincoln might have averted a civil war.

Besides the possibility that certain constitutional provisions are far more vital than the Constitution's (or the nation's) durability, there are sound structural reasons for omitting a generic, constitution-wide failsafe provision. If a constitution contains a failsafe that allows the government to suspend the entire constitution in "emergencies" (however defined), the citizenry runs the risk that the government will continually declare emergencies as a means of evading constitutional constraints. In fact, one might expect that there will be crises all the time.

In this regard, consider the lessons learned from Gramm-Rudman-Hollings. Under that Act (as amended), Congress enacted caps on discretionary spending.²⁰ But the Act also decreed that so-called "emergency spending" would not count towards the cap.²¹ Taking advantage of the emergency spending provisions, Congress routinely underfunded programs during the annual appropriations cycle and thereby nominally stayed under the caps. After the onset of the fiscal year, however, Congress would predictably pass "emergency spending" for matters that ought to have been foreseen and funded during the

(such as the First and Fifth Amendments) ought to trump the more general constitutional principle, especially because the latter is only implicit.

20 See Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 901(c) (2000).

21 See 2 U.S.C. § 901(b)(2)(A) (providing that emergency spending would not be counted in determining whether a sequestration was necessary).

annual appropriations process.²² Gramm-Rudman-Hollings created an incentive to declare emergencies every year, and Congress routinely used the loophole.

Fears of frequent or continuous emergencies might lead constitution-makers to refrain from ceding to the government a general right to suspend constitutional constraints. Given the well understood propensity for governments to extend their power up to and beyond rightful limits, constitution-makers might be properly wary of creating a constitutional “loophole” permitting the easy evasion of constitutional constraints. Justice Jackson cited this very reason in explaining why the Founders (in his view) omitted a generic emergency power. “[T]hey suspected that emergency powers would tend to kindle emergencies.”²³

The Articles of Confederation experience provides an extremely useful data point in judging whether it is implausible for constitution-makers to omit a rule of necessity. In no fewer than five places, the Articles proclaimed that they created a “perpetual union.”²⁴ Nonetheless, the Constitution became necessary precisely because the Articles were inadequate. In particular, the Articles did not grant the Continental Congress the ability to regulate commerce or to raise adequate funds for its operations. To solve this problem, it was thought necessary to amend or replace the Articles. I am not aware of anyone who concluded that the Articles should be understood as permitting Congress to regulate commerce or levy taxes. Yet the Articles ought to have been so read if they contained a rule of necessity. After all, at this moment in history, the Articles *and* the Nation were at stake because there was a chance that the thirteen states might rearrange themselves in smaller federations or that individual states might not agree to any new national framework. Rather than discovering a rule of necessity in the Articles, however, statesmen of the era put the Articles to sleep in favor of a more robust Constitution. That the Articles were not understood as containing a failsafe, notwithstanding the dan-

22 See CONG. BUDGET OFFICE, SUPPLEMENTAL APPROPRIATIONS IN THE 1990s, at 19–21 (2001) (discussing how Congress arguably exploited “emergency” loophole in the Budget Enforcement Act of 1990, Pub L. No. 101-508, 104 Stat. 1388-573, an Act that amended the Balanced Budget and Emergency Deficit Control Act of 1985).

23 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring). Justice Jackson also noted that German governments between the World Wars used an emergency provision in the Weimar Constitution to suspend civil liberties over 250 times over a thirteen year period. *Id.* at 651 (Jackson, J., concurring).

24 ARTICLES OF CONFEDERATION pmbl. (U.S. 1781) (containing one mention of “perpetual Union”); see also *id.* art. XIII, cl. 2 (containing four more mentions of “perpetual Union” or synonymous variants).

gers facing the Articles and the nation and despite the fact that the Articles were supposed to last in perpetuity, proves the plausibility of drafting fundamental frameworks that lack a rule of necessity.²⁵ If the Articles clearly lacked a rule of necessity, why must we read the Constitution as containing one?

Of course, we cannot test how popular the rule of necessity was in 1789. But we can test Professor Paulsen's intuition about the rule of necessity's contemporary appeal. If the Constitution is clearly better off with a rule of necessity and only the most obtuse of us would oppose it, we ought to see if people would favor the rule of necessity (as Professor Paulsen describes it) as an amendment to the Constitution. Surely this would tell us something about the plausibility of omitting the rule of necessity from a constitution created in 1787. At the very least, we might conduct polls testing Professor Paulsen's hunch about the supposed appeal of the rule of necessity. I have no doubt that many reasonable, fair-minded, and intelligent people would embrace the rule of necessity. But I would be shocked if many others did not object to the dangers and mischief that might flow from codifying a rule of necessity. I think that many reasonable people hold a view that Professor Paulsen regards as "inconceivable" and "near-absurd[]."²⁶

Finally, some comments seem necessary on Professor Paulsen's claim that any constitution is suicidal unless it contains a rule of necessity. Is a constitution that lacks a rule of necessity doomed to crumble given its lack of flexibility? Professor Paulsen apparently thinks so, but the answer is hardly obvious. Constitutions empower and constrain. But these paper barriers never work perfectly. Human nature suggests that there always will be violations of these constraints. Given the relative ubiquity of these infractions, there is no reason to believe that governments will refrain from violating a constitution when it re-

25 Of course, Professor Paulsen can always concede all of this, and argue that the Constitution's makers had learned from their mistake and included a generic failsafe in the Constitution. For the reasons discussed in the text, I doubt that they took this route. The Framers solved the problems of the Articles not by including a generic failsafe, but by conveying specific powers thought necessary for a sound federal government.

26 See Paulsen, *supra* note 1, at 1258. Even if one agreed wholeheartedly with Professor Paulsen's view that a failsafe provision must be a part of any sound constitution, there remains the possibility that the Constitution's makers made a mistake. Because humans are fallible, it is always possible that the Constitution's makers failed to include provisions that they intended to include, or would have included had the omission been brought to their attention. I do not place much stock in this argument. I prefer to think that the Constitution's makers did not think it wise to include a generic rule of necessity that permitted the suspension of the Constitution's seemingly absolute limits. Still, framing error is a possibility.

ally matters, i.e., when the future of the government is at stake. We can expect that even when a constitution does not contain a rule of necessity, its government nonetheless will do what it takes to keep itself intact. Citizens can then decide, after the fact, whether their agents ought to be indemnified and/or forgiven for violating the Constitution. This system of *ex post* "ratification" or excusal of constitutional violations forces government officials to struggle with whether the Constitution (or large portions of it) ought to be suspended in a given circumstance. It also requires the House and Senate to exercise judgment as to whether officials ought to be impeached and/or removed for constitutional violations committed in the name of saving the Constitution and/or the nation. This system mirrors a more traditional way of dealing with crises. Rather than straining to construe away violations in situations where the violations seem justified by exigent circumstances, this system does not shy away from finding a violation. Instead, it judges whether the violation ought to be excused.

If I am right about the nature of the Constitution (and Professor Paulsen and President Lincoln are wrong), President Lincoln's unconstitutional actions during the civil war proves my point about how ostensibly suicidal constitutions really are not that suicidal in practice. Despite the fact that the Constitution lacked a rule of necessity, Lincoln did what needed to be done to preserve the nation. In my view, Lincoln's actions ought to be excused. But we ought not to delude ourselves into thinking that Lincoln, in the course of saving the Union, never violated the Constitution.

II. A PECULIAR RULE OF CONSTRUCTION

The first instantiation of the Constitution of Necessity is the meta-rule of construction—where possible avoid reading the Constitution in a manner that would lead to its self-destruction. This rule seems vaguely familiar, given that courts sporadically apply a rule of construction that they will avoid construing statutes as if they were unconstitutional.²⁷ For that reason, Professor Paulsen suggests that his rule should not be overly controversial. The rule attempts to eschew readings of the Constitution that would tend towards its destruction, something that he views as akin to being unconstitutional. Hence he argues that his rule of construction is "equally, if not more, compel-

²⁷ See, e.g. *McConnell v. Fed. Election Comm'n*, 124 S. Ct. 619, 681 (2004) ("When the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (citations and internal quotations omitted).

ling than the various" constitutional avoidance canons.²⁸ I don't think the avoidance canons are that compelling, but in any event, the meta-rule of construction seems quite far removed from the more conventional avoidance canons.

Rules of construction, once applied, yield what we might call a fixed, constructed meaning. Given the rule against implied repeals,²⁹ we might conclude that a more recent statute does not repeal a prior statute. This meaning will not change whatever the future might bring. No matter the changed circumstances, we will not read the more recent statute as repealing the older statute. Likewise, if we construe a statute in such a manner so as to avoid raising a difficult constitutional issue, we will not revisit the resulting meaning at some later point. Application of these (and other) traditional rules of construction generates fixed meanings.

In sharp contrast, Professor Paulsen's meta-rule contemplates variable, contextual "meanings." Take a war power example. Professor Paulsen suggests that in today's context, where instant nuclear incineration is an ever-present threat, the meta-rule of construction effectively operates to allow the President to unilaterally wage a preemptive war.³⁰ This is so even though Professor Paulsen believes that absent the meta-rule of construction, the better constitutional reading is that the President cannot commence military hostilities without congressional approval. Apparently, Professor Paulsen contemplates that his meta-rule of construction only applies in emergency contexts. In other words, it does not apply to determine the general meaning of the relevant war powers clauses, it only applies to determine their emergency meaning. But all this implies that the war powers provisions did not authorize presidential warmaking prior to the advent of the nuclear age, because in the pre-atomic era, there was no rule of necessity reason for the President to have the power to start a war. It also implies that, should we ever develop a device to render nuclear devices impotent, the meta-rule would no longer apply and control of war initiation would revert to the Congress. In effect, his fact-sensitive application of the meta-rule of construction means that the provisions in question have at least two meanings, one ordinary meaning and one emergency danger meaning.

28 Paulsen, *supra* note 1, at 1269.

29 See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189–90 (1978) (noting the "cardinal rule" against implied repeals in the absence of "some affirmative showing of [the legislature's] intention to repeal") (citations and internal quotations omitted).

30 Paulsen, *supra* note 1, at 1272–73.

Multiple meanings are not the result of an interpretive choice that Professor Paulsen may abandon. They are instead an artifact of his meta-rule of construction. His meta-rule is simply *incapable* of establishing a fixed meaning for ambiguous provisions. If what matters is the preservation of the Constitution and nation, ambiguity must always be read in favor of self-preservation. But one can easily construct hypotheticals where self-preservation will require the exact opposite interpretations of a single provision. Consider Lincoln's suspension of the writ of habeas corpus. Professor Paulsen lauds Lincoln's action as necessary to save the nation.³¹ Yet if enough states subsequently became alarmed by the prospect of presidential suspension of habeas corpus, these states could demand that the Habeas Corpus Clause be read the way Chief Justice Roger Taney read it—as only countenancing congressional suspension. To back up this demand, these states could threaten to secede from the Union if they do not get their way. If self-preservation requires the Taney reading under these circumstances, then Lincoln's reading becomes wrong even though it was once right.³²

In the Paulsenian view, ambiguous clauses at most have a contingent meaning that changes with the circumstances. Yet the better, conventional view is that the meaning of text does not change in different contexts unless the text itself provides some reason for believing the meaning might change. Neither the habeas suspension provision nor the war powers provisions provide any clue that they mean different things depending upon what is necessary to preserve the nation. And hence the question arises: Must we subscribe to a living, chameleon Constitution in order to avoid the greater evil of a suicidal one?

If my argument is correct, Professor Paulsen's meta-rule of construction is unlike any known rule of construction. Indeed, one might fairly question whether we need to create a new term to describe the work done by Professor Paulsen's interpretive rule. None of this shows that the meta-rule is wrong or that we ought to reject it, but it does suggest that Professor Paulsen bears a heavy burden in establish-

31 *Id.* at 1269–72.

32 Professor Paulsen's meta-rule of construction is akin to a rule that requires that we adopt constructions of the Constitution that are conducive to economic growth. We might then conclude that governmental power ought to expand during a depression and contract during expansionary times. In the former situation, aggressive governmental intervention in the economy might foster economic growth; in the latter, aggressive governmental intervention might retard growth. But any "economic growth rule of construction" seems more like a contrivance than anything resembling a conventional rule of construction.

ing the meta-rule because he contemplates an interpretive rule with no seeming analog.

Apart from the singular nature of the meta-rule, there also is the question of the provenance of the meta-rule. For an originalist, interpretive rules of whatever sort might apply to the Constitution in one of two ways. The Constitution itself might codify a rule of construction, or the Constitution might have been enacted against a set of accepted, background interpretive rules governing the manner in which it would be interpreted. The Tenth Amendment is an example of the former, and the use of eighteenth century English as the medium of communication is an example of the latter. I am not sure whether Professor Paulsen relies upon either type of argument to establish the meta-rule. Although he cites the Oath Clause quite frequently, he does not apparently argue that the clause actually establishes the meta-rule. The clause establishes a duty and seems a poor candidate for an interpretive rule generator. Nor does he claim that the meta-rule was simply a well known background rule of interpretation such that it was understood to be part of the Constitution thought not explicitly made part of it.

If I am not mistaken, the meta-rule of construction seems to be based on nothing more than the proposition that the Constitution would be a better constitution if we assumed it contained a rule of necessity. But the same could be said of an economic growth meta-rule of construction (construe the Constitution to maximize gross domestic product) or many other interpretive devices that we might favor. Of course, Professor Paulsen is free to advocate the use of an extra-constitutional rule of construction. But if I am right that Professor Paulsen really does not believe that the meta-rule arises out of the Constitution itself, he ought to admit that the meta-rule lacks an originalist basis and is instead merely a desirable (or in his view, absolutely necessary) rule of construction.

III. TEXT, STRUCTURE, AND THE FAILSAFE

Professor Paulsen concludes that both the President and Congress may act to preserve the Constitution and the nation.³³ But he sees a special role for the executive, for only it takes an oath "to preserve, protect and defend" the Constitution.³⁴ As Professor Paulsen correctly notes, the oath is not a source of power as much as it is a

33 Paulsen, *supra* note 1, at 1291-92. If I am not mistaken, Professor Paulsen limits the judiciary to a checking role on the President's exercise of executive power and on the Congress's exercise of the Necessary and Proper power.

34 *Id.* at 1291.

duty.³⁵ The powers which the President must use to preserve, protect, and defend must come from elsewhere. Professor Paulsen argues that the President's executive power enables him to take emergency measures to suspend constitutional constraints, such as the prohibition on abridging the freedom of speech, which might get in the way of preserving the Constitution and the nation as a whole.

The plausibility of Professor Paulsen's claim, it seems to me, must ultimately rest upon the historical understanding of executive power at the time of the Constitution's founding. Nonetheless, constitutional text and structure give us several reasons to doubt his rule of necessity. Let us first consider his claims about congressional power to suspend constitutional provisions. Professor Paulsen believes that the Necessary and Proper Clause enables Congress to pass laws that make it possible for the Constitution and nation to continue, even at the expense of other constitutional provisions.³⁶ He also contends that Congress can use this power specifically to carry into execution the President's emergency powers.³⁷ The second proposition depends upon the correctness of his claim about executive power. I will have more to say about the correctness of the underlying claim in a moment.

The first proposition, however, seems wrong to me. For Congress to rely upon the Necessary and Proper Clause, it has to be carrying into execution some other power of government. After all, this clause does not grant a free-standing power, but instead allows Congress to legislate in support of powers granted elsewhere by the Constitution. If that is so, the clause certainly cannot serve as an independent font of authority to create emergency exceptions. For instance, should Congress suspend the First Amendment, it is hard to see what federal power Congress thereby helps carry into execution. It cannot be an emergency or failsafe power, for that would be to assume the existence of the very power that is doubted. Moreover, the Necessary and Proper Clause contains an independent requirement that all exercises of the clause must be "proper."³⁸ It is far from clear why it would be "proper" to use the clause as a means of vitiating or suspending constitutional constraints such as the right to freedom of religion. If the clause grants Congress independent authority to suspend constitutional provisions, it does so rather surreptitiously and clumsily.

35 *Id.* at 1263 n.14.

36 *Id.* at 1292.

37 *Id.*

38 U.S. CONST. art. I, § 8, cl. 18.

The claimed presidential necessity power lies at the heart of Professor Paulsen's argument. Yet it too seems problematic. Like Paulsen, I also believe that the Executive Power Clause grants the President authorities beyond those listed in Article II. The question is, what are those powers? One of those powers, in fact the essential meaning of the executive power, is the power to execute the laws.³⁹ A duty that modifies this power is the duty to faithfully execute the laws. In my view, it would be odd to require faithful execution of the laws while simultaneously authorizing the suspension of constitutional provisions. Yet it is this jarring juxtaposition that Paulsen finds in the executive power. Under the Paulsenian constitution, the executive power both authorizes law execution and constitution suspension. In fact, the executive must faithfully execute the law and also must faithfully suspend the Constitution if doing so would save the nation and/or the Constitution.

Although Professor Paulsen abjures reliance on the Oath Clause as a source of presidential power, he does suggest that the President must have some power to ensure that the oath is not some cruel, impossible hoax.⁴⁰ There simply must be some other clause that grants the President the means to preserve, protect, and defend the Constitution. But there is a more reasonable, straightforward reading of the Oath Clause, one that does not require or even suggest that the President must have all the means he judges necessary for preserving, protecting, and defending the Constitution. The Oath Clause does not imply a right to unlimited resources and a power to sweep away anyone or anything (including constitutional provisions) that stand in the way of preserving, protecting, and defending. Indeed, if Professor Paulsen took an oath to preserve, protect, and defend the Constitution, no one would argue that his oath was meaningless absent an ability on Professor Paulsen's part to take whatever measures he deemed necessary to safeguard the Constitution. It has meaning and is not some cruel hoax, whether or not Professor Paulsen has an army and unlimited funds at his beck and call.

The better view is that the clause merely requires that the President use whatever resources he has at his disposal to preserve, protect, and defend the Constitution. If the Congress does not grant him an army and navy, the President must stand guard alone, because he cannot raise armies and navies on his own. Likewise, if the Congress does not supply enough subordinate executives to carry on his executive tasks, the President must faithfully execute the law to the best of his

39 See generally Prakash, *supra* note 11.

40 Paulsen, *supra* note 1, at 1263.

abilities given his limited resources. Fulfill your twin duties (protecting the Constitution and faithfully executing the laws) with whatever resources you have, Mr. President.⁴¹

As noted earlier, there are structural reasons to doubt the rule of necessity. Because the Constitution contains numerous specific and explicit emergency provisions, there is reason to doubt that it also grants the President a cross-cutting power to suspend various provisions. For instance, the Third Amendment forbids the quartering of soldiers in times of war except in a manner prescribed by law.⁴² Under Paulsen's rule of necessity, however, the President could quarter soldiers in times of peace or war, in a way contrary to the manner prescribed by a law. Indeed, even if there was no law permitting quartering of soldiers in wartime, the President could suspend the Third Amendment and quarter. May the President completely disregard the Third Amendment's quite specific limitations on quartering? The rule of necessity says yes.

Or consider the Fifth Amendment, which states, *inter alia*, that no person will be held to answer for an infamous crime except on a presentment or indictment of a grand jury.⁴³ The only exception is for cases "arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."⁴⁴ One would have to regard the exception as wholly superfluous because the rule of necessity implicitly appends a similar exception to each and every constitutional constraint.

More generally, Paulsen's rule of necessity effectively creates a constitution-wide balancing test. No constitutional provision is absolute. Yet this flies in the face of the varying ways in which constitutional constraints are crafted. Some provisions invite (almost demand) a balancing approach, thereby loosening their constraints in dangerous times. What constitutes a reasonable search will vary with whether we are at peace or at war.⁴⁵ If the nation has been invaded, invasive and intrusive searches and seizures seem quite justified. In this way, the protection afforded by the Fourth Amendment varies de-

41 This argument about the Oath Clause does not prove that Professor Paulsen's argument about executive power is wrong. But to the extent that his reading of the Oath Clause somehow helps bolster or prove his executive power claim, the alternative reading of the Oath Clause does undermine his overall argument.

42 U.S. CONST. amend. III.

43 *Id.* amend. V.

44 *Id.*

45 "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated" *Id.* amend. IV (emphasis added).

pending upon context. Likewise, what may seem excessive or cruel in peacetime may be absolutely necessary in emergency situations. In this way, the application of the Eighth Amendment varies with the context.⁴⁶

Other constitutional constraints do not seem so flexible. The prohibition against expending funds without an appropriation does not seem to admit an emergency exception.⁴⁷ The prohibition against ex post facto laws and bills of attainder likewise apparently brooks no loophole.⁴⁸ Finally, do we think that Congress can, in the face of an emergency, define treason as saying nasty but true things against the government, despite the careful crafting of the Treason Clause?⁴⁹ The better reading of the Constitution is that while some constraints may be loosened in emergencies, other constraints are meant to be fixed in stone. The Paulsenian constitution, with its rule of necessity, contemplates that all constraints may constrain so long as they do not constrain too much. And that is a dangerous proposition, for constraints are often most useful and necessary precisely when we would rather ignore them.

One final argument strikes at the core of the claim that the Constitution was meant to last forever and ever. To Paulsen, it is unthinkable that constitution-makers would make constitutions that lack the ability to endure in perpetuity.⁵⁰ Hence arises the imperative for maximum flexibility in any sensible constitution. But a comparison of the Articles of Confederation with the Constitution suggests that the Constitution's makers were not laboring under the delusion that their Constitution would last forever. In no less than five places, the Articles proclaim that it creates a "perpetual Union." As is well known the Articles lasted less than a decade and their demise was foreseen almost as soon as it was ratified. Perhaps recognizing the futility of trying to create a perpetual framework, the Constitution merely creates a "more perfect Union,"⁵¹ not one that is perpetual and perfect. In the eyes of the Framers, the Constitution was undoubtedly much better

46 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* amend. VIII.

47 "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Id.* art. I, § 9, cl. 7.

48 "No Bill of Attainder or ex post facto Law shall be passed." *Id.* art. I, § 9, cl. 3.

49 "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.* art. III, § 3, cl. 1.

50 Paulsen, *supra* note 1, at 1258.

51 U.S. CONST. pmbl.

than the Articles ("more perfect"). But it is almost impossible to believe that the Constitution's makers envisioned that the Constitution would establish a perpetual framework, especially given the early demise of the prior framework and given that they eschewed language scattered throughout the Articles that indicated a desire for an everlasting framework. I do not believe that the Constitution's framers had such hubris.

IV. HISTORY AND THE FAILSAFE

As noted earlier, if a rule of necessity empowers the executive, it must exist because of a historical understanding that executives had the power to take emergency measures to save the country in times of peril. Professor Paulsen cites Abraham Lincoln's actions and arguments during the Civil War as support for the rule of necessity.⁵² Yet Lincoln's actions and arguments are not very sound evidence of any original meaning. Lincoln was born well after 1789 and he made his fateful decisions some three score and fourteen years after the Constitution's birth. We must look to earlier periods if we are to find proper evidence of the original meaning of the executive power.

I know of no evidence from the Founding era that the President (or any other branch for that matter) was regarded as possessing a generic power to suspend the Constitution. Indeed, I do not know of anyone who even discussed the issue. What we do know is that there is evidence from English history suggesting the lack of a law suspension power. An explicit constraint on the English executive was the English Bill of Right's prohibition on suspending or dispensing the law.⁵³ The English monarch had suspended a series of laws designed to preclude Catholics from serving in the government. To suspend these laws was to nullify them, leaving them with no force. Parliament was none too pleased with these suspensions, and it prohibited them in the Bill of Rights.⁵⁴ Several early state constitutions included analogues to these prohibitions. Despite the lack of an explicit prohibition in the federal Constitution, it seems clear that the federal executive power in 1787 was not regarded as including the power to suspend lawful statutes (whether it permitted the President to ignore unconstitutional laws is another question). Given this background, it seems unlikely that the Constitution granted the President a much more consequential power of suspending the Constitution itself.

⁵² Paulsen, *supra* note 1, at 1263–67.

⁵³ See ENGLISH BILL OF RIGHTS (U.K. 1689), available at <http://www.yale.edu/lawweb/avalon/england.htm>.

⁵⁴ See *id.*

The affections and primary loyalties of Americans in 1787 also suggest that the continued existence of the Constitution was not foremost in their minds. People more often considered themselves as "Virginians" or "New Yorkers" rather than Americans. That being the case, they might not have agreed to a provision that would have made it possible for the interests of the states to have been discarded in the name of preserving the Constitution or the nation. Would Rhode Islanders loyal to their "Island" be willing to authorize suspension of all the constraints on enumerated powers or the equal state suffrage in the Senate? There were enough people who voted against the Constitution in the state conventions to suggest that preservation of the nation was not the ultimate goal of many Americans. After all, those who voted against the Constitution knew that their states might not remain part of the United States of America had their side prevailed. And of those who favored the Constitution, it is far from clear that they would have favored it had it contained an explicit rule of necessity that imperiled the provisions that they favored.

None of this precludes the possibility of building an impressive historical case for an emergency constitutional suspension power. But one would have to examine the Revolutionary War (and wars occurring in close proximity to the Constitution's founding) rather than the Civil War, and determine whether executives (and the government) generally believed that they were empowered to suspend constitutional constraints. It is not enough that these executives might have violated constitutional constraints; constitutional violations are common events and are even more common in times of war. Instead, we would need to find evidence that people recognized that the governors were empowered to suspend constraints—that the steps taken were understood as authorized rather than as constitutional violations. I doubt that this is Professor Paulsen's final word on this subject, and so perhaps he will pursue this task at some point in the future.

CONCLUSION

Does the Constitution contain mini rules of necessity? It is beyond dispute that the Constitution contains provisions that grant the government extra flexibility in times of war or crisis. For example, the Fifth Amendment applies differently in wartime,⁵⁵ as does the Third

55 This amendment provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia,*

Amendment.⁵⁶ Moreover, the government likely enjoys increased subject matter powers in times of war. The war power arguably includes the power to adopt a war footing where some of the normal enumerated power constraints do not apply. Likewise, the commander in chief probably can do more (as a matter of constitutional law) in times of war than he can in peacetime. But all this is a far cry from a claim that in times of crisis the President and/or Congress may suspend the entire Constitution. The text and structure suggest that no entity within the federal government has such power, and the historical case for it has yet to be made.

Does this mean that the Constitution is a suicide pact? Not in the sense that the Constitution was meant to fail. A suicide pact is an agreement where parties agree to end their lives together. I do not think the Constitution was so understood. Undoubtedly, people write constitutions hoping that they will succeed, if not in perpetuity, at least for the long haul. But if by suicide pact Professor Paulsen means that the Constitution merely does not include a rule of necessity, then I think the Constitution is a suicide pact.⁵⁷

Professor Paulsen's reading of the Constitution brings to mind the M-5 computer of the original *Star Trek* series. In *The Ultimate Computer*,⁵⁸ M-5—believing that it was under attack—fired upon other starships that were engaged in mock battle exercises. To justify its attacks, the computer remorselessly droned that “this unit must survive.” It had been impressed with the trait of self-preservation by its creator, the brilliant yet crazed Doctor Richard Daystrom.

But the M-5 unit had also been programmed to value human life and to avoid killing. This command eventually trumped the seem-

when in actual service in time of War or public danger . . .” U.S. CONST. amend. V (emphasis added).

56 “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, *nor in time of war, but in a manner to be prescribed by law.*” *Id.* amend. III (emphasis added).

57 Professor Paulsen is clearly playing a little fast and loose with the conventional meaning of suicide pact. No one would regard a simple contract between two parties as a “suicide pact” if the pact did not contemplate its perpetual existence. Most contracts end at some point and most contracts are not regarded as suicide pacts. The same can be said for social compacts, like constitutions. We ought not regard a constitution with a sunset provision as a suicide pact merely because the constitution does not envision that it will last forever. Similarly, we ought not regard the U.S. Constitution as a true suicide pact merely if we conclude it does not contain the rule of necessity.

58 For a brief synopsis of this episode, see StarTrek.com, *The Ultimate Computer*, at <http://www.startrek.com/startrek/view/series/TOS/episode/68766.html> (last visited May 23, 2004).

ingly iron-clad rule of self-preservation. If Daystrom's "perfect" computer recognized values higher than self-preservation, why not our Constitution? Is it so hard to believe that when the Constitution's makers forbade Congress from passing bills of attainder, they really meant to establish an absolute prohibition, not one that could be waived in some exigency, including the very exigencies where people would be most likely to succumb to the temptation to pass a bill of attainder? Some would argue that a system that values self-preservation at all costs is a suicide of another sort, for the system sacrifices all other ideals on the false altar of survival.